Supreme Court, U.S.
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No. 99-1073

In The

Supreme Court of the United States

MICHAEL DENT,

Petitioner,

vs.

CONSOLIDATED RAIL CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

PHILIP E. HOWES, ESQUIRE
Counsel of Record
VOGELGESANG, HOWES, LINDAMOOD & BRUNN
400 Tuscarawas St. W., Ste. 200
P.O. Box 20870
Canton, OH 44701-0870
(330) 456-3483

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTION PRESENTED

Respondent restates the Questions Presented as follows:

1. Should this Court decline to grant certiorari to review a claimed question of law in a case where the Petitioner failed to present adequate evidence supporting his liability theory and the theory of liability assumed a duty involving an unlawful act?

PARTIES TO THE PROCEEDING AND DESIGNATION OF CORPORATE RELATIONSHIPS

All of the parties to the proceeding are named in the caption. The parent companies of Consoildated Rail Corporation are Conrail, Inc., which is the 100% owner of Consolidated Rail Corporation; Green Acquisition Corporation, which is the 100% owner of Conrail, Inc.; and CRR Holdings LLC, which is the 100% owner of Green Acquisition Corporation. Norfolk Southern Corporation and CSX Corporation each own 50% of the stock of CRR Holdings LLC. The non-wholly owned subsidiaries of Consolidated Rail Corporation are LMS Partnership (50%) and Indiana Harbor Belt R.R. Company (51%).

I. STATEMENT OF CASE

This action was brought under the Federal Employer's Liability Act (FELA). The case was tried in the federal district court in Columbus, Ohio.

After an adverse jury verdict on petitioner's single "failure to train" theory of liability, and the denial of respondent's Rule 50 motion for judgment as a matter of law, Conrail appealed. The U.S. Court of Appeals for the Sixth Circuit reversed, granted Conrail's post-judgment motion as a matter of law, and remanded for entry of judgment in favor of respondent.

Petitioner, Michael Dent, now seeks review of the Sixth Circuit's determination that his evidence had failed, as a matter of law, to show that Conrail breached a duty owed to him, or that any breach caused the injury for which he sought compensation.

II. SUMMARY OF ARGUMENT

Dent's failure to present a legally sufficient evidentiary basis for his claims was the result of his decision to sue his employer instead of the third-party wrongdoer who caused the accident.

III. REASONS FOR DENYING THE WRIT

The Petition, Which Seeks To Have The Court Reverse The Judgment Of The Court Of Appeals, Should Be Denied Because Plaintiff Failed To Present Sufficient Evidence Supporting His Liability Theory And That Liability Theory Assumed A Duty Involving An Unlawful Act.

Petitioner's description of the accident is substantially accurate. However, it lacks an explanation of why the "red truck . . . stopped in the middle of the track."

Vale Shepard borrowed his employer's red pickup truck and equipment trailer to work at home over a weekend. Subsequently, the truck stalled when he shifted

gears on a rural railroad crossing in front of Conrail's approaching train. Shepard saw the train coming, assumed he had time to cross the tracks, but downshifted from fourth to third gear at too low a speed and the truck stalled. Unable to get the truck restarted in time, Shepard exited the truck just before the crash.

Michael Dent was Conrail's engineer, lawfully operating the locomotive that hit Shepard's pickup truck. Dent claimed he was injured when the horn handle broke and he fell (or dove) to the floor seconds before the collision, landing on his grip.

Dent, assuming apparently that an FELA claim against his employer-railroad had the higher dollar potential, sued only the railroad for his alleged injury, and ignored the straightforward claim against Shepard, whose negligence he admitted[1] was the cause of the accident. Dent's refusal to join Shepard in the action resulted in the peculiar procedural posture of the case on appeal.

Because Conrail's conduct did not cause the accident, the petitioner's case went to the jury on two novel theories of liability. First, Dent claimed Conrail had violated the Boiler Inspection Act (BIA) by not providing a horn handle in the locomotive which was in proper condition and safe for operation, *i.e.*, would not break when Dent pulled on it too hard. Dent's second theory was that the railroad should have trained him to avoid anxiety and panic when faced with an impending crossing accident. He claimed that such training would have prevented him from pulling too hard on the horn, and he would have abandoned the horn and moved cautiously to a place of safety.

Only the second of these theories of liability was the subject of respondent's appeal. The BIA issue was resolved by a special interrogatory to the jury that was answered in the negative, finding no BIA violation. The

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[1] Record Vol. I, Page 123, Lines 13-17.

jury's verdict was entered against Conrail solely on the "failure to train" issue.

Accordingly, the respondent's Rule 50 motion for judgment as a matter of law was limited to the issue of Conrail's alleged negligence for "failure to train" Dent to avoid panic and anxiety.

Conrail claimed in its motion for judgment that it was an innocent party in this accident and that no legally sufficient evidence had been introduced by Dent to show the railroad was negligent or that the conduct of the railroad caused Dent's injury, in whole or in part.

The motion was denied by the trial court. An appeal to the Sixth Circuit followed, with respondent seeking a "de novo" review of the trial court's denial of the motion for judgment.

The circuit court, reviewing the questions of law and fact as though it was the trial court, correctly determined that the plaintiff had failed to show Conrail was negligent or that Conrail's negligence caused the injury for which Dent sought compensation.

Dent's expert, Dr. Bogett, was the sole witness called in support of the "failure to train" issue. Petitioner has presented the substance of Bogett's conclusory opinions on pages 9-10 of the petition.

Bogett was allowed to opine that Dent was "mistaken" about having a "responsibility"[2] to keep blowing the train horn; that Dent should have stopped blowing the horn and "carefully moved to a position of safety"[3] after setting the emergency brake. With proper training, according to Bogett, Dent would have abandoned the horn instead of behaving "normal"[4] and continue blowing until Shepard exited the stalled truck.

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[2] Pet. 9.

[3] Pet. 10.

[4] Pet. 10.

Bogett's opinions, in addition to being "raw speculation" and "conclusory,"[5] suffered from another fatal flaw: What Bogett proposed Conrail should have trained Dent to do was prohibited by law. Ohio's train horn statute required that the train's horn be sounded up to and **through each crossing.**

> "When an engine in motion and approaching a turnpike, highway or street crossing . . . the engineer of such engine shall sound such whistle at a distance of at least 80 and not farther than 100 rods from such crossing and ring such bell **continuously until the engine passes the crossing.**" (Emphasis added) *Ohio Revised Code* Section 4955.32.

Section 4955.34 of the Ohio Revised Code provided that "every engineer . . . in charge of an engine who fails to comply with section 4955.32" is personally liable for a civil penalty, and the employer of such engineer is strictly liable in damages for injury or damage caused by the engineer's failure to comply with the horn statute. Given the foregoing provisions, it is not surprising that Bogett had to admit that no railroad in the United States had ever adopted his recommendation.[6]

Not only was Bogett's recommendation for training Dent in conflict with state law, it also conflicted with Dent's testimony about the "rules" requiring him to blow the horn until the locomotive occupies the crossing[7] Bogett's testimony also conflicted with Dent's explanation of how he was injured. While Bogett said his injury was caused by not knowing what to do, Dent had testified

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[5] Pet. App. 4.

[6] Record, Vol. II, Page 31, Lines 15-21 (App. 3).

[7] Record, Vol. I, Page 59, Lines 5-9 (App. 2).

he went to the floor because the "whistle handle broke off."[8]

IV. CONCLUSION

This case has no constitutional dimensions. The outcome was ordained when petitioner elected to file an FELA action against his employer rather than a state BI claim against the tortfeasor who was the cause of the accident. The petition should be denied.

Respectfully submitted,

PHILIP E. HOWES
VOGELGESANG, HOWES, LINDAMOOD & BRUNN
400 Tuscarawas Street, West – Suite 200
P.O. Box 20870
Canton, OH 44701-0870
(330) 456-3483 FAX: (330) 456-9533

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[8] Record, Vol. I, Page 123, Lines 21-22, Page 124, Lines 19-22 (App. 2).

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

MICHAEL H. DENT,	:	
PLAINTIFF,	:	
VS.	:	
CONSOLIDATED RAIL CORPORATION,	:	CASE NO. C-2-95-458
DEFENDANT/THIRD-PARTY PLAINTIFF,	:	
VS.	:	
COUNTRYSIDE COMPANIES, INC. DBA COUNTRYSIDE CONSTRUCTION, ET AL.,	:	
THIRD-PARTY DEFENDANTS.	:	

EXCERPTS OF PROCEEDINGS

BEFORE THE HONORABLE EDMUND A. SARGUS, JR., UNITED STATES DISTRICT JUDGE, SITTING AT COLUMBUS, OHIO, FROM FEBRUARY 2, 1998, TO FEBRUARY 5, 1998.

APPEARANCES:

MICHAEL J. OLLEY, ESQ.

ON BEHALF OF THE PLAINTIFF.

PHILIP E. HOWES, ESQ., AND JOSEPH V. ERWIN, ESQ.

ON BEHALF OF THE DEFENDANT/THIRD-PARTY PLAINTIFF, WILLIAM J. CHRISTENSEN, ESQ.,

ON BEHALF OF THE THIRD-PARTY DEFENDANT.

* * *

Record, Vol. I, Page 59, Lines 5-9.

A. We have got rules, there is a cadence that an engineer has got to follows, and it's two longs, a short and a long; and you have to do that cadence until you're through the crossing, until you've occupied the road crossing.

* * *

Record, Vol. I, Page 123, Lines 13-17.

Q: As you sit here today, are you persuaded that the entire cause of the accident, i.e. your hitting the truck, was the result of Mr. Shepard pulling onto the crossing and stalling in front of you?

A. Yes.

* * *

Record, Vol. I, Page 123, Lines 21-22,
Page 124, Lines 19-22.

A. No. The reason why I took a dive to the floor was the whistle handle broke off.

Q. That you were pulling on the whistle handle so hard with your right hand that when the whistle handle let go, you went down?

A. Correct.

* * *

Vol. II, Page 31, Lines 15-21.

Q. You indicated that you had made recommendations to the railroad community regarding training of crews to go to that position, did you not?

A. Yes.

Q. Do you know if any part of that railroad community adopted your recommendations?

A. I don't know. I doubt it from what I've seen.

* * *